

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAYNELL CARMICHAEL,) No. C 07-5622 CW (PR)
)
Plaintiff,) ORDER GRANTING DEFENDANTS'
) MOTION FOR SUMMARY JUDGMENT
v.)
)
JAMES E. TILTON, et al.,) (Docket no. 44)
)
Defendants.)
_____)

INTRODUCTION

Plaintiff Raynell Carmichael, a state prisoner incarcerated at San Quentin State Prison (SQSP), brought this pro se civil rights case under 42 U.S.C. § 1983, alleging that prison officials at High Desert State Prison (HDSP) and SQSP were deliberately indifferent to his serious medical needs from 2003 through 2007 because they denied him proper medical care for his "elevated alkaline phosphatase" levels and complaints of "pain" in his "neck, back, shoulder right and left, elbow, right knee, etc." (Attach. to Compl. at 10.)

On September 22, 2008, the Court found that Plaintiff had adequately alleged a cognizable Eighth Amendment claim of deliberate indifference to his serious medical needs against SQSP Defendants Physicians Sundarson, Wilson, David, Emami, Slater, Zalpuri, Corzine and Daszko as well as Nurse Practitioners Erickson and Hopking. The Court dismissed Plaintiff's claims relating to his incarceration and the conditions of his confinement at HDSP, including all claims against HDSP Defendants Felker, Sandhan,

1 Rohlfing, Dickerson, Dial, James and Roche without prejudice to
2 refiling in the United States District Court for the Eastern
3 District of California. The Court also dismissed with prejudice
4 Plaintiff's claim against Defendant Grannis relating to the
5 grievance process and dismissed Plaintiff's supervisory liability
6 claims against Defendants Hickman, Tilton, Sillen, Ayers, St.
7 Clair, Saylor and Kana with leave to amend within thirty days.

8 On November 10, 2008, because Plaintiff failed timely to amend
9 the supervisory liability claims, the Court dismissed these claims
10 without prejudice (docket no. 30).

11 On April 1, 2009, all remaining Defendants -- Sundarson,
12 Wilson, David, Emami, Slater, Zalpur, Corzine, Daszko, Erickson and
13 Hopking -- filed the present motion for summary judgment on the
14 grounds that they did not act with deliberate indifference to his
15 serious medical needs, that they did not cause Plaintiff any
16 deprivation of his constitutional rights, that Plaintiff may not
17 sustain a § 1983 suit against them in their official capacities, and
18 that they are entitled to qualified immunity because a reasonable
19 medical practitioner could have believed their conduct was lawful
20 (docket no. 44). Plaintiff filed an opposition to Defendants'
21 motion on April 30, 2009 (docket no. 48). Defendants filed a reply
22 on May 21, 2009 (docket no. 49).

23 For the reasons discussed below, Defendants' motion for summary
24 judgment is GRANTED.
25

26 FACTUAL BACKGROUND

27 I. Plaintiff's Elevated Alkaline Phosphatase Levels Detected

28 On June 28, 2005, Plaintiff was transferred to SQSP. (Compl.
at 14.) On December 22, 2005, he underwent a blood test, which

1 displayed an elevated alkaline phosphatase reading.¹ (Maiorino
2 Decl., Ex. A at 165.)

3 On January 6, 2006, Nurse Practitioner Erickson diagnosed
4 Plaintiff with hypertension, irritable bowel syndrome and
5 hyperlipidemia. (Id., Ex. A at 13.) Nurse Practitioner Erickson
6 recommended continuing Plaintiff's current medication to treat these
7 afflictions. (Id.)

8 On March 30, 2006, Plaintiff, for the second time at SQSP,
9 displayed an elevated alkaline phosphatase level. (Id., Ex. A at
10 18.)

11 In May, 2006, an unnamed doctor ordered tests to determine the
12 cause of the elevated alkaline phosphatase level. (Pl.'s Decl. in
13 Supp. of Serious Inadequate Medical Treatment Continues, Ex. 12.)
14 The doctor was primarily concerned with the possibility of myeloma.
15 (Id.) According to Plaintiff, the doctor at this visit prescribed a
16 pain medication which effectively relieved Plaintiff's back pain.
17 (Id.)

18 On June 1, 2006, Plaintiff went to the emergency room at Novato
19 Community Hospital complaining of abdominal pain and expressing
20 concern that his elevated alkaline phosphatase levels were
21 indicative of a tumor. (Maiorino Decl., Ex. A at 20-21.) Dr.
22 Thompson confirmed that Plaintiff's alkaline phosphatase levels were
23 elevated, prescribed a stool softener, and recommended increased
24 fruit and fiber intake. (Id.) Pursuant to Dr. Thompson's requests,
25 Plaintiff received a CT-scan and a series of x-rays in early June to
26 detect cancer. (Id., Ex. A at 22-23, 26-27.) Tests reported no

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28 ¹ Phosphatases are a group of enzymes found in the liver and
bone. The primary purpose of checking the levels of alkaline
phosphatase is to detect liver or bone disease.

1 cancer but indicated degenerative changes in the spine "probably due
2 to" Plaintiff's obesity. (Id.) The imaging report from the CT-scan
3 also recommended a nuclear bone scan. (Id., Ex. A at 22-23.)

4 On July 7, 2007, Plaintiff underwent the nuclear bone scan.
5 (Id., Ex. A at 37-38.) Dr. Cohen analyzed the results and concluded
6 that there was possible evidence of soft tissue damage which could
7 indicate the infiltration of a disease.

8 On August 24, 2006, in response to Plaintiff's concerns about
9 possible cancer, he was sent to Dr. Sowerby for a colonoscopy.

10 (Id., Ex. A at 5.) Dr. Sowerby noted that Plaintiff's results were
11 normal except for a benign four millimeter left colon polyp. (Id.)

12 II. Consultation with UCSF Physicians and Continued Testing

13 On August 29, 2006, due to difficulty in determining the cause
14 of Plaintiff's elevated alkaline phosphatase and pain, prison
15 officials consulted University of California San Francisco (UCSF)
16 physicians, Drs. Suiter and Shavit. (Id., Ex. A at 52-53.) Those
17 doctors concluded that Plaintiff's lab and imaging abnormalities
18 were indicative of metabolic bone disease "possibly due to a vitamin
19 D deficiency." (Id.) The doctors recommended the following
20 treatment plan: (1) continuous vitamin D and alkaline phosphatase
21 testing going forward; (2) if the levels test low, "aggressive
22 [vitamin D] replacement and . . . an endocrine consultation"; and
23 (3) "more aggressive pain control along with diet and weight loss
24 counseling." (Id.)

25 On September 12, 2006, Plaintiff was sent to East Bay
26 Cardiology for a consultation, complaining of shortness of breath,
27 chest pain, and elevated alkaline phosphatase levels. (Id., Ex. A
28 at 58-59.) The consulting doctor noted that Plaintiff was taking

1 tramadol for pain at the time of the visit. (Id.)

2 On November 7, 2006, Plaintiff met with Dr. Epstein for an x-
3 ray examination of his left shoulder. (Id., Ex A at 61.) Dr.
4 Epstein noted that the shoulder was unremarkable aside from a slight
5 narrowing at the acromioclavicular joint. (Id.)

6 On November 14 and 28, 2006, Plaintiff complained of left
7 shoulder pain to Dr. Daszko. (Id., Ex. A at 61, 63.) Dr. Daszko
8 prescribed Ultram to supplement Plaintiff's tramadol dose. (Id.)
9 Additionally, Dr. Daszko treated Plaintiff's vitamin D deficiency by
10 prescribing 50,000 units of vitamin D bi-daily for three weeks and
11 then 50,000 units once a day for three months. (Id., Ex. A at 63.)

12 On January 3, 2007, Plaintiff was sent to Dr. Epstein, who took
13 x-rays of his right knee. (Id., Ex. A at 66.) Dr. Epstein found
14 that both knees were normally aligned with only mild degenerative
15 sharpening in the right knee. (Id.) Dr. Epstein concluded that
16 osteoarthritis was the likely cause of Plaintiff's right knee pain.
17 (Id.)

18
19 III. SQSP Physicians Manage Pain and Refer Plaintiff to Specialists

20 On February 26, 2007, Plaintiff was sent to Dr. David,
21 complaining that he was experiencing significant pain in his knees,
22 hips and low back. (Id., Ex. A at 68-69.) Dr. David noted that the
23 cause of the increased pain was that Plaintiff decided to stop the
24 methadone that was previously ordered despite the fact that it was
25 successfully controlling his pain. (Id.) Instead, Plaintiff
26 reverted to tramadol which "does not control the pain as well as the
27 methadone" (Id.) Dr. David also noted elevated levels of
28 both alkaline phosphatase and vitamin D. (Id.) In response to

1 these developments, Dr. David prescribed MS Contin (an opiate) for
2 pain, discontinued methadone treatment, and advised Plaintiff to
3 continue tramadol until the MS Contin became available. (Id.) Dr.
4 David noted that if the root problem was the vitamin D deficiency,
5 the three months of supplementation would have aided more than was
6 evidenced. (Id.) Accordingly, Dr. David reduced Plaintiff's
7 vitamin D dose from 50,000 units daily to 50,000 units weekly and
8 recommended both bone density testing and hip x-rays. (Id.)

9 On March 1, 2007, following the UCSF physicians'
10 recommendations, Plaintiff saw Dr. Madrilejo, an outside
11 endocrinologist. (Id., Ex. A at 72-72.) Dr. Madrilejo noted that
12 Plaintiff's vitamin D levels had dropped and recommended both a full
13 metabolic panel and a bone density scan. (Id.)

14 On March 2, 2007, pursuant to Dr. David's recommendation,
15 Plaintiff saw Dr. Epstein for hip x-rays. (Id., Ex. A at 75.) Dr.
16 Epstein noted that Plaintiff's hips appeared normal and that Paget's
17 disease² was doubtful. (Id.)

18 On March 5, 2007, Plaintiff saw Dr. David for a follow-up,
19 complaining that he had not yet received his pain medication. (Id.,
20 Ex. A at 81-82.) Dr. David noted that she called the pharmacy to
21 determine the cause of the delay and that the pharmacy asserted that
22 there was no MS Contin currently available. (Id.) Dr. David also
23 noted that, at Plaintiff's February 26, 2007 visit, she instructed
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25
26 ² Paget's disease is a chronic bone condition characterized by
27 disorder of the normal bone remodeling process. Paget's disease
28 commonly causes no symptoms and is incidentally noted when x-ray
tests are obtained for other reasons. However, Paget's disease can
cause bone pain, deformity, fracture and arthritis.

1 him to take tramadol for pain until the MS Contin she prescribed
2 became available at the pharmacy. (Id.) Dr. David noted that
3 Plaintiff admitted that he had tramadol in his possession. (Id.)
4 Dr. David also noted that she ordered a bone density scan in accord
5 with Dr. Madrilejo's March 1, 2007 recommendation. (Id.) Finally,
6 Dr. David observed that Plaintiff's chief complaint was his knee
7 pain and that although "[his] pain may actually respond quite well
8 to a local joint injection . . . [he] is refusing to be considered
9 for joint injections and would just like to continue on oral pain
10 medications for now." (Id.) Dr. David recommended physical therapy
11 and physical conditioning and noted that "if [Plaintiff] changes his
12 mind regarding intervention for his knee, we will refer him either
13 to minor procedure clinic or orthopedics for evaluation for joint
14 injection." (Id.)

15 On March 27, 2007, Plaintiff went to Marin Medical Laboratories
16 for his bone density scan following Dr. Madrilejo's recommendation
17 and Dr. David's order. (Id., Ex. A at 76-77.)

18 On April 26, 2007, Plaintiff saw Dr. Madrilejo for a follow-up
19 visit, complaining of left hip pain. (Id., Ex. A, 78-79.) Dr.
20 Madrilejo noted that the etiology of the elevated alkaline
21 phosphatase levels was not clear and that x-rays of the hip were not
22 suggestive of Paget's disease. (Id.) Dr. Madrilejo recommended
23 that Plaintiff see a metabolism expert at the University of Southern
24 California (USC) and asserted that he could do nothing more to help.
25 (Id.)

26 On May 7, 2007, Plaintiff saw Dr. David for a follow-up from
27 his second appointment with Dr. Madrilejo. (Id., Ex. A at 90-91.)
28

1 Dr. David noted that Plaintiff's vitamin D deficiency had been
2 adequately treated, that his alkaline phosphatase levels were still
3 elevated, and that although his complaints of pain continued,
4 Plaintiff "says pain is tolerable with his current medications which
5 are MS Contin and Naprosyn . . . [and] a little nighttime dose of
6 amitriptyline." (Id.) Dr. David noted that Plaintiff would be
7 "referred to a metabolism specialist at the request of Dr.
8 Madjerlaho [sic]" but clarified that the specialist would have to be
9 at UCSF, not USC due to the geographical location of SQSP. (Id.)

10 On May 25, 2007, Plaintiff saw a second outside
11 endocrinologist, Dr. O'Connor. (Pl.'s Decl. in Supp. of Serious
12 Medical Condition, Ex. 3.) Dr. O'Connor noted that Plaintiff's
13 vitamin D levels were high and that any pain was likely due to
14 osteoarthritis. (Id.) Dr. O'Connor recommended maintaining the
15 current level of medication and to continue testing for alkaline
16 phosphatase levels. (Id.)

17 On June 4, 2007, Plaintiff saw Dr. David for a follow-up
18 appointment, reporting that he had run out of a number of his
19 medications and that he "felt his pain was better controlled" by the
20 MS Contin regimen. (Maiorino Decl., Ex. A at 97.) Dr. David
21 reported contacting the pharmacy who informed him that they now had
22 the medications available. (Id. at 98.) Additionally, Dr. David
23 noted that Plaintiff, who had at this point received a steroid
24 injection in his left shoulder, was handling the shoulder pain
25 significantly better as a result of the injection. (Id. at 97.)
26 Dr. David noted that Plaintiff's vitamin D deficiency was being
27 successfully treated with vitamin D supplementation, that his joint
28

1 pain was likely due to osteoarthritis, and that she would take Dr.
2 O'Connor's suggestion of preliminary testing for inflammatory
3 arthritis. (Id. at 98.) Additionally, Dr. David noted that "for
4 [Plaintiff's] pain, we will increase his Elavil to 30 mg at night,
5 also increase his MS Contin to 60 mg in the morning and continue MS
6 Contin 30 mg in the evening." (Id.)

7 On June 21, 2007, Plaintiff saw Dr. David for a follow-up
8 appointment, reporting stiffness and popping in his right thumb,
9 elbow and shoulder and asserting that "he is not sure exactly how
10 long it has been getting worse" but denying any prolonged pain.
11 (Id., Ex. A at 99-100.) Plaintiff informed Dr. David that, in his
12 opinion, exercise may be the problem. (Id.) Dr. David noted that
13 Plaintiff maintained full range of motion in all areas. (Id.) She
14 recommended range of motion and weight-bearing exercises, and
15 advised Plaintiff to take pain medication when he experienced pain
16 and stiffness. (Id.) Dr. David also ordered x-rays of Plaintiff's
17 hand. (Id.)

18 On June 27, 2007, Plaintiff saw Dr. Epstein for his hand x-
19 rays. (Id., Ex. A at 101.) Dr. Epstein noted that Plaintiff's
20 wrists appeared "unremarkable" with "no significant arthritic
21 change." (Id.)

22 On July 7, 2007, Plaintiff went to the Nuclear Medicine
23 Department at Novato Community Hospital for a nuclear total body
24 scan following Dr. Madrilejo's recommendation. (Id., Ex. A at 102.)
25 The report indicated that the "faint and patchy" areas of the scan
26 "may be related to soft tissue attenuation," which were consistent
27 with "possible infiltration of a disease." (Id.)

1 On July 20, 2007, Plaintiff saw Dr. David for a follow-up
2 appointment, complaining that his left shoulder was "hurting as bad
3 as it did prior to his injection." (Id., Ex. A at 103.) Plaintiff
4 requested an additional steroid injection, and he also reported a
5 "new discomfort of numbness and tingling in his fourth and third
6 fingers on his left hand" as well as lower back pain exacerbated by
7 walking. (Id.) Dr. David noted that, during the exam, Plaintiff
8 was "clenching and unclenching his hands and crossing his arms
9 across his body . . . in a fluid brisk motion without any
10 difficulty." (Id. at 104.) Dr. David recommended that Plaintiff
11 stay active, lose weight, and continue his exercises. (Id.) Dr.
12 David noted that she would continue to monitor Plaintiff's back
13 pain, that he did not show any symptoms indicative of a neurologic
14 compromise, and that his osteoarthritis pain was currently tolerable
15 and controlled by his medical regimen. (Id.) Finally, Dr. David
16 noted that they had been unable to schedule Plaintiff with a bone
17 and metabolism specialist, in accord with Dr. Madrilejo's February
18 26, 2007 recommendation, but that Plaintiff had an upcoming
19 endocrinology consultation. (Id.)
20

21 On August 24, 2007, Plaintiff saw Dr. O'Connor for a follow-up
22 consultation, complaining of pain in the neck, left shoulder and
23 back. (Id., Ex. A at 105-06.) Dr. O'Connor noted that Plaintiff's
24 vitamin D levels "dropped off rapidly" and that Plaintiff exhibited
25 a low oral calcium intake. (Id.) To explain his low oral calcium
26 intake, Plaintiff asserted that he was lactose intolerant. (Id.)
27 Dr. O'Connor recommended initiating ergocalciferol (a calcium
28 supplement) and a rheumatological consultation "to assess

1 [Plaintiff] for other causes of arthritis and pain." (Id.)

2 On August 27, 2007, Plaintiff saw Physician's Assistant (P.A.)
3 Nancy Bahnsen for a left shoulder steroid injection pursuant to Dr.
4 David's recommendation. (Id., Ex. A at 113-14.) Plaintiff informed
5 P.A. Bahnsen that, in his opinion, vitamin D deficiency was not the
6 cause of his elevated alkaline phosphatase and that he needed to see
7 a rheumatologist. (Id.) P.A. Bahnsen observed that Plaintiff had
8 full range of motion in his shoulder and no change in pain during
9 posterior lift off. (Id.) P.A. Bahnsen administered the injection,
10 noted that Plaintiff was only permitted to have three injections
11 annually, and recommended that he wait at least six months before
12 his next injection. (Id.)

13 On September 6, 2007, Plaintiff saw Dr. David for a follow-up
14 appointment, complaining of joint aches. (Id., Ex. A at 115-17.)
15 Plaintiff asserted that, since his August 27, 2007 injection, his
16 shoulder pain had "improved." (Id.) Dr. David noted that Plaintiff
17 also claimed the numbness and tingling in his hands had lessened.
18 (Id.) Dr. David attempted to explain the reason for Plaintiff's
19 elevated alkaline phosphatase levels, stating:
20

21 Exact etiology of his elevated alkaline phosphatase may, in
22 fact, be multifactorial. He certainly has osteoarthritis.
23 He also has vitamin D deficiency. Failure of his alkaline
phosphatase to improve with replacement may indicate other
processes, and I think we need to consider Paget's disease in
our differential diagnosis.

24 (Id.) Dr. David noted that she would refer Plaintiff for a
25 gastrointestinal evaluation, that she would order lab tests for
26 Paget's disease, and that she would check shoulder x-rays for
27 Paget's disease. (Id.) Dr. David noted that if the plain films
28 showed findings consistent with Paget's disease, she would consider

1 prescribing fosamax for his pain and elevated alkaline phosphatase
2 levels. (Id.)

3 On September 17, 2007, Plaintiff saw Dr. Epstein, who took x-
4 rays of his shoulder pursuant to Dr. David's September 6, 2007
5 order. (Id., Ex. A at 118.) Dr. Epstein noted "no definite
6 evidence to suggest Paget's disease." (Id.)

7 On October 2, 2007, Plaintiff saw Dr. Rand who addressed his
8 complaints of pain by increasing his MS Contin regimen. (Pl.'s
9 Decl. in Supp. of Serious Inadequate Medical Treatment Continues,
10 Ex. 1.)

11 IV. Paget's Disease Diagnosis and Treatment

12 On October 8, 2007 Plaintiff saw Dr. Rand for analysis of a CT-
13 scan. (Id. at 3.) Dr. Rand took the CT-scan to her colleague, a
14 bone metabolism expert at UCSF, and diagnosed him with Paget's
15 disease. (Id.) Defendants then ordered an MRI, a CT-scan, a bone
16 scan and more x-rays. (Id.) Thereafter, Plaintiff was prescribed
17 fosamax, vitamin D and calcium supplements, which proved to be
18 successful in treating his Paget's disease. (Id. at 5, Ex. 2 at 6.)

19 On November 6, 2007, Plaintiff filed the present action.
20

21 LEGAL STANDARD FOR SUMMARY JUDGMENT

22 Summary judgment is properly granted when no genuine and
23 disputed issues of material fact remain and when, viewing the
24 evidence most favorably to the non-moving party, the movant is
25 clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56;
26 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v.
27 Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

28 The moving party bears the burden of showing that there is no

1 material factual dispute. Therefore, the Court must regard as true
2 the opposing party's evidence, if supported by affidavits or other
3 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d
4 at 1289. The Court must draw all reasonable inferences in favor of
5 the party against whom summary judgment is sought. Matsushita Elec.
6 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel
7 Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th
8 Cir. 1991). A verified complaint may be used as an opposing
9 affidavit under Rule 56, as long as it is based on personal
10 knowledge and sets forth specific facts admissible in evidence.

11 Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995).

12 Material facts which would preclude entry of summary judgment
13 are those which, under applicable substantive law, may affect the
14 outcome of the case. The substantive law will identify which facts
15 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
16 (1986). Where the moving party does not bear the burden of proof on
17 an issue at trial, the moving party may discharge its burden of
18 showing that no genuine issue of material fact remains by
19 demonstrating that "there is an absence of evidence to support the
20 nonmoving party's case." Celotex, 477 U.S. at 325. The burden then
21 shifts to the opposing party to produce "specific evidence, through
22 affidavits or admissible discovery material, to show that the
23 dispute exists." Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th
24 Cir. 1991), cert. denied, 502 U.S. 994 (1991). A complete failure
25 of proof concerning an essential element of the non-moving party's
26 case necessarily renders all other facts immaterial. Celotex, 477
27 U.S. at 323.
28

DISCUSSION

Plaintiff claims that Defendants were negligent in providing treatment for his elevated alkaline phosphatase levels, decreased vitamin D levels and associated pain. He claims that Defendants never initiated a particular test to discover the cause of the elevated alkaline phosphatase levels and back pain. (Pl.'s Compl. at 15.) Specifically, Plaintiff alleges that: (1) Defendants administered an "excessive dose of vitamin D" resulting in progressive deterioration of his medical condition; (2) after months of misdiagnosing Plaintiff's condition as vitamin D deficiency, Defendants "recognized Plaintiff suffered from Paget's disease and began to prescribe medications and therapy to mask the effects of their failures with pain medications: Ultram, Methadone, Morphine, Amitryptiline and Steroid injections"; and (3) Defendants failed timely to identify Paget's disease. (Opp'n at 4-5.) Plaintiff asserts that he was in substantial pain for the two years after his arrival at SQSP. (Pl.'s Compl. at 15.)

Deliberate indifference to serious medical needs violates the Eighth Amendment's prohibition against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). The analysis of a claim of "deliberate indifference" to serious medical needs involves an examination of two elements: (1) a prisoner's serious medical needs and (2) a deliberately indifferent response by the defendants to those needs. McGuckin, 974 F.2d

1 at 1059.

2 A serious medical need exists if the failure to treat a
3 prisoner's condition could result in further significant injury or
4 the "wanton infliction of unnecessary pain." Id. (citing Estelle,
5 429 U.S. at 104). The existence of an injury that a reasonable
6 doctor or patient would find important and worthy of comment or
7 treatment; the presence of a medical condition that significantly
8 affects an individual's daily activities; or the existence of
9 chronic and substantial pain are examples of indications that a
10 prisoner has a serious need for medical treatment. Id. at 1059-60
11 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir.
12 1990)).

13 Defendants acknowledge that Plaintiff's elevated alkaline
14 phosphatase, vitamin D deficiency, joint pain and related problems
15 amounted to serious medical needs. However, Defendants argue that
16 Plaintiff fails to show that, during the course of their evaluations
17 and treatment, they were deliberately indifferent to his serious
18 medical needs.

19 A prison official is deliberately indifferent if he or she
20 knows that a prisoner faces a substantial risk of serious harm and
21 disregards that risk by failing to take reasonable steps to abate
22 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). In order to
23 establish deliberate indifference, a plaintiff must show a
24 purposeful act or failure to act on the part of the defendant and a
25 resulting harm. McGuckin, 974 F.2d at 1060; Shapley v. Nevado Bd.
26 of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). Such
27 indifference may appear when prison officials deny, delay or
28 intentionally interfere with medical treatment, or it may be shown

1 in the way in which prison officials provided medical care. See
2 McGuckin, 974 F.2d at 1062.

3 A claim of medical malpractice or negligence is insufficient to
4 make out a violation of the Eighth Amendment. See Franklin v. State
5 of Or., State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981);
6 Toguchi v. Chung, 391 F.3d 1051, 1130 (9th Cir. 2004); McGuckin, 974
7 F.2d at 1059 (mere negligence in diagnosing or treating a medical
8 condition, without more, does not violate a prisoner's Eighth
9 Amendment rights); O'Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir.
10 1990) (repeatedly failing to satisfy requests for aspirins and
11 antacids to alleviate headaches, nausea and pains is not
12 constitutional violation; isolated occurrences of neglect may
13 constitute grounds for medical malpractice but do not rise to level
14 of unnecessary and wanton infliction of pain).

15 Here, Plaintiff's claim that Defendants were negligent in
16 providing treatment and accurately diagnosing his ailment does not
17 support a claim of deliberate indifference. The record amply shows
18 that Defendants provided adequate care to Plaintiff. Even if the
19 definitive diagnosis of Paget's disease was delayed, the record
20 shows that Defendants examined Plaintiff on multiple occasions and
21 gave him adequate treatment for his pain from June 28, 2005 through
22 November 6, 2007. During this period, Plaintiff had over ten
23 primary care visits, multiple specialist visits, numerous imaging
24 consultations, various x-rays, two CT-scans, a nuclear bone scan and
25 a colonoscopy. He also received a variety of specialty care for his
26 elevated alkaline phosphatase levels, decreased vitamin D levels and
27 associated pain. As soon as Defendants received the results of the
28 August 29, 2006 UCSF consultation with Drs. Suiter and Shavit,

1 Defendants immediately followed their treatment recommendation.
2 Defendants also followed the UCSF physicians' advice and continued
3 blood testing for both alkaline phosphatase and vitamin D. Upon
4 discovering low vitamin D levels, Defendants followed the UCSF
5 physicians' recommendations of employing "aggressive" vitamin D
6 replacement. Plaintiff was then immediately referred to Dr.
7 Madrilejo, an outside endocrinologist. Finally, Defendants followed
8 the UCSF physicians' recommendation of referring Plaintiff to
9 physical therapy and taking a more aggressive approach to his pain
10 treatment. For pain, Defendants not only prescribed tramadol,
11 methadone and MS Contin, but also administered multiple steroid
12 injections. The pain treatment was initially successful. When
13 Plaintiff chose to take himself off the medication, Defendants
14 immediately prescribed alternative pain therapy. In addition,
15 Defendants went above and beyond the UCSF physicians'
16 recommendations by ordering multiple x-rays, full metabolic panels,
17 and a nuclear bone scan.

18 Moreover, the evidence demonstrates that during the period of
19 treatment Defendants were constantly searching for a root cause of
20 Plaintiff's symptoms. However, the delay in reaching the Paget's
21 disease diagnosis was not a result of deliberate indifference but
22 rather of the inherent difficulty in isolating the disease. See
23 Walker v. Benjamin, 293 F.3d 1030, 1038 (7th Cir. 2002) (doctor
24 entitled to summary judgment where plaintiff presented no evidence
25 that delays between plaintiff's initial visit, diagnosis and visit
26 to the specialist were within the doctor's control, that the doctor
27 was deliberately indifferent to the medical needs, or that the delay
28 contributed to plaintiff's injuries). Even though Defendants, on

1 multiple occasions, received results inconsistent with Paget's
2 disease, they never ruled out a diagnosis of that disease. For
3 example, Drs. Madrilejo and Epstein noted that Plaintiff's hip x-
4 rays were not suggestive of Paget's disease. However, Drs. David
5 and Rand continued testing Plaintiff and seeking further
6 consultation until he was definitively diagnosed with Paget's
7 disease. Defendants successfully treated him with prescribed
8 medications. Further, throughout the delay in reaching that
9 diagnosis, Defendants responded to Plaintiff's complaints of pain
10 and continued to give him follow-up care according to his medical
11 needs. Defendants prescribed medication for Plaintiff's pain as
12 well as for his insufficient oral calcium intake and vitamin D
13 levels. Therefore, considering the evidence in the light most
14 favorable to Plaintiff, the Court finds it insufficient to raise a
15 dispute of material fact that Defendants were deliberately
16 indifferent to Plaintiff's serious medical needs. Cf. Ortiz v. City
17 of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989) (summary judgment
18 reversed where medical staff and doctor knew of head injury,
19 disregarded evidence of complications to which they had been
20 specifically alerted and, without examination, prescribed
21 contraindicated sedatives).

22 Plaintiff further argues that both the treatment he received
23 from Defendants and their attempt to mask their failures led to
24 further permanent injuries. Specifically, Plaintiff alleges that
25 an excessive dose of vitamin D given to him by
26 defendants caused or made worse his Paget's disease due
27 to defendant's misdiagnosis of his serious medical
28 condition resulting in deterioration progressively.
After months of misdiagnosis and upon realizing what
was initially thought to be merely a vitamin D
deficiency, defendants recognized plaintiff suffered
from Paget's disease and began to prescribe medications

1 and therapy to mask the effects of their failures with
2 pain medications: Ultram, Methadone, Morphine,
3 Amitryptiline, and steroid injections.

4 (Pl.'s Opp'n at 4). First, Plaintiff provides no evidence linking
5 his progressive deterioration to Defendants treatment plan. More
6 importantly, Plaintiff's argument amounts to a difference of
7 opinion, i.e., Defendants prescribed too much vitamin D and used
8 pain medication to mask their failures. For example, Plaintiff
9 argues that, on November 12, 2006, Dr. Daszko failed to address
10 "appropriately" his vitamin D deficiency. (Pl.'s Compl. at 17).
11 Similarly, Plaintiff contends that Dr. David failed to reduce his
12 vitamin D supplementation resulting in further injury. (Id. at 18.)
13 Finally, Plaintiff asserts that Defendants failed to diagnose him
14 adequately. (Id. at 14-15.)

15 Even if Plaintiff should have received different treatment, he
16 presents no evidence that Defendants were deliberately indifferent
17 to his serious medical needs. Rather, Defendants: (1) diagnosed his
18 medical conditions as they arose; (2) monitored his status with
19 follow-up treatment; (3) provided physical therapy, access to a
20 dietician, multiple specialists and powerful prescription drugs to
21 control his pain; and (4) ultimately successfully diagnosed and
22 treated him for Paget's disease. Thus, Plaintiff has failed to
23 provide evidence regarding an essential element of this claim.
24 Accordingly, the Court GRANTS Defendants' motion for summary
25 judgment.

26 III. Qualified Immunity

27 Defendants claim, in the alternative, that even if Plaintiff's
28 allegations revealed a constitutional violation, qualified immunity
would protect them from liability for Plaintiff's deliberate

1 indifference claim.

2 The defense of qualified immunity protects "government
3 officials . . . from liability for civil damages insofar as their
4 conduct does not violate clearly established statutory or
5 constitutional rights of which a reasonable person would have
6 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The rule
7 of qualified immunity provides ample protection to "all but the
8 plainly incompetent or those who knowingly violate the law;"
9 defendants can have a reasonable, but mistaken, belief about the
10 facts or about what the law requires in any given situation.
11 Saucier v. Katz, 533 U.S. 194, 202 (2001) (internal quotation marks
12 and citation omitted). The threshold question in qualified immunity
13 analysis is: "Taken in the light most favorable to the party
14 asserting the injury, do the facts alleged show the officer's
15 conduct violated a constitutional right?" Id. at 201. A court
16 considering a claim of qualified immunity must determine whether the
17 plaintiff has alleged the deprivation of an actual constitutional
18 right and whether such right was "clearly established." Pearson v.
19 Callahan, __ U.S. __, 129 S. Ct. 808, 818 (2009). Where there is no
20 clearly established law that certain conduct constitutes a
21 constitutional violation, the defendant cannot be on notice that
22 such conduct is unlawful. Rodis v. City and County of S.F., 558
23 F.3d 964, 970 (9th Cir. 2009). The relevant, dispositive inquiry in
24 determining whether a right is clearly established is whether it
25 would be clear to a reasonable defendant that his conduct was
26 unlawful in the situation he confronted. Saucier, 533 U.S. at 202.

27 On these facts, viewed in the light most favorable to
28 Plaintiff, Defendants prevail as a matter of law on their qualified

1 immunity defense because the record establishes no Eighth Amendment
2 violation. See Harlow, 457 U.S. at 818. However, even if a
3 constitutional violation had occurred with respect to Plaintiff's
4 claim of deliberate indifference to his serious medical needs, in
5 light of clearly established principles at the time of the incident,
6 Defendants could have reasonably believed their conduct was lawful.
7 See Estate of Ford, 301 F.3d at 1049-50.

8 Defendants do not dispute that Plaintiff's right to be free
9 from deliberate indifference to his serious medical needs was
10 clearly established during the period within which the injuries
11 complained of occurred.

12 Given the circumstances, Defendants' actions were reasonably
13 calculated to alleviate Plaintiff's pain and ultimately identify and
14 treat the core cause of Plaintiff's condition. Based on the
15 evidence available to Defendants, their actions were reasonable and
16 appropriately tailored to Plaintiff's condition and symptoms.
17 Defendants' actions eventually resulted in a definitive diagnosis of
18 Paget's disease and a successful treatment plan. Therefore, a
19 reasonable person in Defendants' situation could have believed that
20 his actions did not violate Plaintiff's clearly established
21 constitutional rights.

22 Accordingly, Defendants are entitled to qualified immunity with
23 respect to Plaintiff's deliberate indifference claim, and their
24 motion for summary judgment is GRANTED on those grounds as well.

25 CONCLUSION

26 For the foregoing reasons, Defendants' motion for summary
27 judgment (docket no. 44) is GRANTED. The Clerk of the Court shall
28 enter judgment, terminate all pending motions, and close the file.

1 All parties shall bear their own costs.

2 This Order terminates Docket no. 44

3 IT IS SO ORDERED.

4 DATED: 3/17/2010



CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 RAYNELL CARMICHAEL,

5 Plaintiff,

6 v.

7 RODERICK HICKMAN et al,

8 Defendant.
9 _____/

Case Number: CV07-05622 CW

CERTIFICATE OF SERVICE

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on March 18, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Raynell Carmichael D-25366
16 San Quentin State Prison-2N1-L
17 San Quentin, CA 94974

18 Dated: March 18, 2010

19 Richard W. Wieking, Clerk
20 By: Sheilah Cahill, Deputy Clerk
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